

Proposed BDS Regulatory Regime Must Comply with the United States' WTO Commitments on Telecommunications Services

Congress, recognizing that it could open foreign markets for US suppliers by securing WTO telecommunications commitments from other countries in exchange for making commitments itself, its suppliers would need access to foreign markets on non-discriminatory terms and conditions, and that resale is a key entry strategy for US suppliers in foreign markets, authorized the negotiation of WTO commitments by the United States on telecommunications services.¹ The US made the following WTO commitments which require, inter alia, the United States government and hence the Commission to:

- I. Ensure that Tariffs for Ethernet and TDM Access are Made Publicly Available – this commitment requires tariffs and other information affecting access to and use of telecommunications services to be made public irrespective of whether markets are competitive.² This is a blanket requirement. There are no provisions allowing the United States to forbear from complying with its WTO GATTs commitments. The only route to avoid complying is to begin the process to modify or withdraw the United States' WTO commitments whereby other Member countries would also have the opportunity to make compensatory adjustments affecting U.S. companies' access to those markets. Therefore, to be in compliance, the Commission must require providers of Ethernet and TDM telecommunications services to tariff their Ethernet and TDM services.
- II. Ensure that Rates for TDM and Ethernet Services are Reasonable and Non-Discriminatory – the Commission must take actions to make certain that any supplier of any other WTO Member is accorded access to and use of U.S. telecommunications services on reasonable and non-discriminatory terms and conditions.³ USTR has complained of international call termination rates in Pakistan which increased when Pakistan allowed a single supplier to control international call termination.⁴ It would be similarly inconsistent for the Commission to allow leased line termination rates to be unfettered, and to rise because they are set by a single provider or duopoly for 99% of BDS locations. The GATS commitments do not contemplate that the mere presence of two providers, or one provider and one potential entrant, in a market suffices to satisfy competition concerns because it calls for signatories to actively maintain measures to prevent duopolists or "suppliers who, alone or together are a major supplier" from rigging markets in their favour.⁵

¹ Uruguay Round Agreements Act, Pub. L. 103-465 Section 135 (b) – "The principal negotiating objective of the United States in the extended negotiations on basic telecommunications services to be conducted under the auspices of the WTO is to obtain the opening on non-discriminatory terms and conditions of foreign markets for basic telecommunications services through ... the resale of services on existing networks."

² See GATS Annex on Telecommunications, Art. 4

³ *Id* at Art 5(a).

⁴ See USTR's 2013, 2014 and 2015 Section 1377 Review On Compliance with Telecommunications Trade Agreements.

⁵ See GATS Reference Paper on Telecommunications Services, Art. 1.1 and United States of America, Schedule of Specific Commitments, GATS/SC/90 (15 April 1994).

- III. Ensure that Rates for TDM and Ethernet Services are Cost-Oriented -- the Commission must make certain that a supplier can interconnect to telecommunications network or services of a major supplier including to its last mile Ethernet and TDM services at cost-oriented rates that are sufficiently unbundled, and at rates, terms and conditions that are non-discriminatory, transparent, and reasonable so as to allow users of one supplier to communicate with users of another supplier.⁶ ILECs alone, or a duopoly of ILEC and cable companies, are major suppliers of TDM and Ethernet services in a significant majority of geographic markets⁷ because they meet the WTO definition of major suppliers.⁸ There are only one or, at most two providers, with facilities providing or potentially capable of providing BDS in 95% of census blocks in the US. Therefore there are only a "limited number of suppliers" who "exclusively or predominantly" provide the telecommunications network facilities to deliver TDM or Ethernet services. This is especially true for the low bandwidth market (i.e. Ethernet services ≤ 50 Mbps and TDM services ≤ 45 Mbps) for the vast majority of buildings or census blocks. They can materially affect participation in this market, and their facilities and/or BDS services cannot feasibly be economically substituted.⁹ Therefore, for the United States to be in compliance with its GATS commitments, the Commission must set pricing for these low-bandwidth products at cost-oriented rates.
- IV. Ensure that Appropriate Measures are Maintained to Prevent Anti-Competitive Practices - the United States committed to ensure that no major suppliers acting alone or together could engage in or continue an anti-competitive practices including anti-competitive cross-subsidization.¹⁰ By allowing greater and greater concentration of the telecommunications industry while eliminating safeguards that would allow the Commission to detect anti-competitive behaviour, the Commission no longer has measures to prevent anti-competitive practices. The Supreme Court's decisions in *Trinko*¹¹ and *Linkline*¹² have compounded the error by lessening antitrust protections for the telecommunications industry. As a result, the United States is noncompliant with this commitment. Allowing supranormal pricing of BDS services and permitting incumbents to use these excess profits to cross-subsidize their

⁶ *Id.* at Arts. 2.1 and 2.2.

⁷ The relevant geographic market cannot be the MSA given that the Commission discarded use of MSAs because "MSAs have generally failed to reflect the scope of competitive entry" and "in many instances, the scope of competitive entry has apparently been far smaller than predicted." *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, and 05-25, RM-10593, Order and FNPRM (rel. June 24, 2016) ("BDS NPRM") at ¶287. The Commission states that census tracts are also large relative to the data regarding deployment distances submitted to the Commission as a result of the data collection. *Id.* at ¶214. The relevant market therefore is a building, a census block.

⁸ See GATS Reference Paper on Telecommunications Services, Definitions.

⁹ See Sprint Ex Parte Attachment, Overview of the BDS Record, filed in the BDS NPRM (Sept. 28, 2016).

¹⁰ See GATS Reference Paper on Telecommunications Services, Arts 1.1 and 1.2.

¹¹ *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004).

¹² *Pacific Bell v. Linkline Communications Inc.*, 555 U.S. 438 (2009).

activities in the residential broadband market, is a clear example of what this treaty commitment was supposed to prevent.

- V. Ensure that No Conditions are Imposed on Access and Use of Telecommunications Services other than as are Necessary to:- (a) Safeguard the Public Service Responsibilities of Providers, (b) Protect Technical Integrity of Networks or Services, or (c) Ensure Suppliers from Other WTO Members do not Supply Services Unless Permitted under WTO¹³-- ILEC and ILEC affiliates' ("ILEC") imposition of high rack rates unless a wholesale purchaser spends a major percentage of its previous term's spend with the ILEC is an unlawful condition on access to Ethernet and TDM telecommunications because such a condition is not necessary to safeguard the public service responsibilities of carriers, to preserve technical integrity nor is it necessary to prevent ultra vires provision of services. The Commission must prohibit such conditions as inconsistent with its GATS commitments.

¹³ GATS Annex on Telecommunications, Art. 5(e).

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SERVICES: AGREEMENT

Annex on telecommunications

1. Objectives [Back to top](#)

Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provisions to the Agreement.

Notes:

1. This paragraph is understood to mean that each Member shall ensure that the obligations of this Annex are applied with respect to suppliers of public telecommunications transport networks and services by whatever measures are necessary. [Back to text](#)

2. The term "non-discriminatory" is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean "terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances". [Back to text](#)

2. Scope [Back to top](#)

(a) This Annex shall apply to all measures of a Member that affect access to and use of public telecommunications transport networks and services. (1)

(b) This Annex shall not apply to measures affecting the cable or broadcast distribution of radio or television programming.

(c) Nothing in this Annex shall be construed:

(i) to require a Member to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its Schedule; or

(ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally.

3. Definitions [Back to top](#)

For the purposes of this Annex:

(a) "Telecommunications" means the transmission and reception of signals by any electromagnetic means.

(b) "Public telecommunications transport service" means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, *inter alia*, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information.

(c) "Public telecommunications transport network" means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points.

(d) "Intra-corporate communications" means telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and, subject to a Member's domestic laws and regulations, affiliates. For these purposes, "subsidiaries", "branches" and, where applicable, "affiliates" shall be as defined by each Member. "Intra-corporate communications" in this Annex excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.

(e) Any reference to a paragraph or subparagraph of this Annex includes all subdivisions thereof.

4. Transparency [Back to top](#)

In the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including tariffs and other terms and conditions of service:

specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.

5. Access to and use of Public Telecommunications Transport Networks and Services

(a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f).⁽²⁾

(b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted:

(i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier's services;

(ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and

(iii) to use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

(d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

(e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:

(i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;

(ii) to protect the technical integrity of public telecommunications transport networks or services; or

(iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.

(f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:

(i) restrictions on resale or shared use of such services;

(ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;

(iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7(a);

(iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;

(v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits

leased or owned by another service supplier; or

(vi) notification, registration and licensing.

(g) Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.

6. Technical Cooperation [\[Annex 6\]](#)

(a) Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services. To this end, Members endorse and encourage the participation, to the fullest extent practicable, of developed and developing countries and their suppliers of public telecommunications transport networks and services and other entities in the development programmes of international and regional organizations, including the International Telecommunication Union, the United Nations Development Programme, and the International Bank for Reconstruction and Development.

(b) Members shall encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels.

(c) In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.

(d) Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.

7. Relation to International Organizations and Agreements [\[Annex 7\]](#)

(a) Members recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization.

(b) Members recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services, in particular the International Telecommunication Union. Members shall make appropriate arrangements, where relevant, for consultation with such organizations on matters arising from the implementation of this Annex.

WORLD TRADE
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Trade in Services

THE UNITED STATES OF AMERICA

Schedule of Specific Commitments

Supplement 2

(This is authentic in English only)

This text supplements the entries relating to the Telecommunications section contained on pages 45 to 46 of document GATS/SC/90.

UNITED STATES - SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
2.C. TELECOMMUNICATIONS SERVICES:			
2.C.a. Voice services	(1) None	(1) None	The United States undertakes the obligations contained in the reference paper attached hereto.
2.C.b. Packet-switched data transmission services	(2) None	(2) None	
2.C.c. Circuit-switched data transmission services	(3) None, other than	(3) None	
2.C.d. Telex services	- Comsat has exclusive rights to links with Intelsat and Inmarsat.		
2.C.e. Telegraph services	- Ownership of a common carrier radio license:		
2.C.f. Facsimile services	Indirect: None		
2.C.g. Private leased circuit services	Direct: May not be granted to or held by (a) foreign government or the representative thereof (b) non-U.S. citizen or the representative of any non-U.S. citizen		

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons				
Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	
2.C.o. Other				
Mobile Services				
Analogue/Digital cellular services	(c) any corporation not organized under the laws of the United States or (d) U.S. corporation of which more than 20% of the capital stock is owned or voted by a foreign government or its representative, non-U.S. citizens or their representatives or a corporation not organized under the laws of the United States.			
PCS (Personal Communications services)				
Paging services	(4) Unbound except as indicated by horizontal commitments	(4) Unbound except as indicated by horizontal commitments.		
Mobile data services				
*Excluding one-way satellite transmissions of DTH and DBS television services and of digital audio services				